Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

GARY MAYER,

Petitioner,

v.

NEXTEL WEST CORPORATION,
d/b/a NEXTEL COMMUNICATIONS
a DELAWARE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eighth Circuit err when it affirmed the District Court's order granting Respondent's motion for summary judgment on Petitioner's claim that Respondent fired him on account of his age in violation of federal and state age discrimination laws where:

   a. the District Court found that Petitioner had presented a prima facie case of age discrimination;

   b. the District Court also found that Petitioner had presented sufficient evidence for a jury to find that the reason for Petitioner's dismissal proffered by Respondent was false; and

   c. nothing in the record before the District Court excluded age discrimination as the true reason for Petitioner's dismissal?

2. Did the Eighth Circuit err when it held that a jury could not infer Respondent's discriminatory motive from evidence establishing a prima facie case of discrimination and showing that the reason for Petitioner's dismissal proffered by Respondent was false when no uncontroverted evidence established that discrimination had not occurred?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption.

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OPINIONS BELOW

The Order of the Eighth Circuit denying Petitioner's Motion for a Rehearing En Banc is reprinted at Appendix A. The Panel Opinion of the Eighth Circuit is reported at 318 F.3d 803 (8th Cir. 203) and is reprinted at Appendix B. The Order of the United States District Court for the District of Minnesota is reprinted at Appendix C.

STATEMENT OF JURISDICTION

On March 14, 2003 the Eighth Circuit issued its order denying Petitioner's motion for a rehearing en banc on the panel decision of the Eighth Circuit affirming the order of the Minnesota District Court granting Respondent's motion for summary judgment. This petition for certiorari is filed timely within 90 days of March 14, 2003. The Court has jurisdiction under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves a claim arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 and the Minnesota Human Rights Act, Minn. Stat. §363.03. In particular, 29 U.S.C. §621 states that it is the purpose of the ADEA ". . . to promote employment of older persons based on their ability rather than age. . . ." Under 29 U.S.C. §623, it is ". . . unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age. . . ."

STATEMENT OF THE CASE

I. Overview of the Case

Petitioner seeks a writ of certiorari to review the decision of the Eighth Circuit in his case for two reasons. First, the Eighth Circuit applied a rule contrary to this Court's holding in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed. 2d 105 (2000) regarding the evidence required for an age discrimination case to survive summary judgment and go to a jury. Second, the Eighth Circuit's decision is inconsistent with the rulings of other circuit courts on this important issue.

II. Background of the Case

Petitioner worked for Respondent as a sales manager. On September 30, 1999, Petitioner's supervisor fired him without warning. Although Petitioner asked for an explanation repeatedly, the supervisor refused to give him one.

At the time of Petitioner's termination, he was sixty years of age and his supervisor was thirty-six. Respondent replaced Petitioner with a much younger employee.

Petitioner enjoyed a successful career in sales and sales management prior to joining Respondent. Petitioner never had a poor performance review.

In 1996, Respondent recruited Petitioner who then held a good position with another company. In January of 1997, Respondent offered Petitioner a job as a sales manager. Petitioner accepted and started working for Respondent in January of 1997. Prior to the offer and acceptance, Petitioner was twice interviewed by one of Respondent's general

managers who became Petitioner's first supervisor with Respondent. When he was hired by Respondent, Petitioner was fifty-seven and his supervisor was fifty-eight.

In July of 1997, Respondent replaced Petitioner's fifty-eight year old supervisor with one who was then thirty-four years of age. This supervisor is the one who terminated Petitioner in September of 1999.

Petitioner succeeded as a sales manager for Respondent. The group managed by him exceeded the quotas established by Respondent.

Petitioner received good performance reviews from Respondent. Only in a few categories out of many was a need for improvement ever noted. Although Respondent claims that Petitioner was fired because of his performance, his reviews, including one conducted less than two months before his termination, show that his performance was acceptable.

In a review of Petitioner's performance conducted in January of 1998, one of the questions addressed by Petitioner's supervisor was whether he had an effective process for hiring people. On this point, the supervisor wrote that Petitioner should focus on the right person rather than the task at hand in selecting the people to be hired. When asked about that remark during his deposition in this case, the supervisor stated the right person was one with two to six years of sales experience. Since only younger people are likely to have a short period of sales experience the remark might be interpreted by a jury as a preference for younger rather than older employees.

Respondent never told Petitioner that he faced termination unless his performance improved. Instead, he was fired by

his supervisor without warning on September 30, 1999. Petitioner was shocked and asked for an explanation but the supervisor refused to give him one.

After he was fired, pursuant to Minn. Stat. §181.933, Petitioner demanded that Respondent provide a written explanation of the reasons for his termination. Respondent answered with three subjective reasons: poor business judgment, poor business knowledge and poor sales management skills. Later, before the District Court in this litigation, Respondent changed its story and contended that a series of incidents culminated in Petitioner's discharge.

All of the reasons assembled by Respondent for Petitioner's termination are contradicted by Respondent's own reviews of Plaintiff's performance. The District Court gave careful consideration to the performance reviews that Petitioner received from Respondent and found that ". . . the information contained in the reviews shows that Mayer's performance was adequate at the time of his termination. . . ." (App. C, p. 24a) Later in its opinion, the District Court found that the evidence was sufficient to permit a jury to disbelieve Respondent's explanation for Petitioner's termination. The District Court stated in its conclusion as follows:

> "Because Mayer consistently received the rating of 'meets requirements' on his performance reviews, up to the month prior to his termination the court finds that Mayer has raised an issue of material fact as to whether Nextel's proffered reasons for termination were pretextual." (App. C, p. 24a - 27a)

There is no explanation for Petitioner's termination in the record other than the pretextual one proffered by Respondent.

III. Proceedings Below

Petitioner sued Respondent for age discrimination in the United States District Court for the District of Minnesota. Respondent moved for summary judgment. The District Court found that Petitioner's evidence was sufficient to establish a prima facie case of age discrimination and to permit a jury to disbelieve the reasons proffered by Respondent for dismissing Petitioner. Although there was nothing in the record providing any non-discriminatory reason for Petitioner's dismissal, other than the disputed one proffered by Respondent, the District Court granted Respondent's motion for summary judgment on the ground that no rational factfinder could conclude that Petitioner's age was a material factor in his termination. (App. C, p. 28a)

Petitioner appealed to the Eighth Circuit which affirmed the District Court. The Eighth Circuit decided that it need not directly address whether Petitioner's evidence established pretext because even if the evidence was sufficient to disbelieve the reason for Petitioner's termination advanced by Respondent, a jury could not infer age discrimination from Petitioner's evidence.

REASONS FOR GRANTING PETITION

Petitioner asks for review of the decision of the Eighth Circuit in this case because it conflicts with this Court's ruling in Reeves v. Sanderson Plumbing Products, Inc., supra. Because Petitioner's age discrimination claim is based on circumstantial evidence, the sufficiency of his evidence is analyzed under the three step system originating in this

Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.3d. 2d 668 (1973).

Under the McDonnell Douglas system, the court determines first, whether a plaintiff's evidence made out a prima facie case. In the case at bar, both the District Court and the Eighth Circuit decided that Petitioner had made out a prima facie case. The second step of the system requires that the defendant provide a non-discriminatory explanation for its treatment of the plaintiff. There is no dispute in this case that Respondent offered a nondiscriminatory reason, namely, that Petitioner was fired because of his performance.

The third step requires that the plaintiff provide evidence that the explanation proffered by the defendant is not true but is a pretext for discrimination. In this case, the District Court held that Petitioner's evidence was sufficient for a jury to conclude that Respondent's explanation was a pretext but, nevertheless, was not enough for a jury to infer that Petitioner's age was a material factor in his termination. Hence, the District Court granted summary judgment to Respondent.

In affirming the District Court, the Eighth Circuit also held that Petitioner had to provide evidence beyond that establishing a prima facie case and the falsity of Respondent's explanation in order to have his claim decided by a jury. (App. B, p. 10a) This ruling places upon Petitioner a burden beyond that required under Reeves, which permits but does not require a jury to infer that age was the reason for a plaintiff's dismissal from such evidence absent something in the record showing that no discrimination has occurred.

The Eighth Circuit's decision usurped the role of the jury which should decide the appropriate inferences that should be

drawn from the evidence. Especially in a discrimination case where an employer's true motive is often concealed, a jury rather than the court should decide what inference to be drawn when an employer's explanation is unworthy of belief after seeing and hearing the employer's witnesses.

In Reeves, this Court explained as follows regarding the inference a jury may draw from an explanation proffered by a defendant that it disbelieves:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination and it may be quite persuasive. See *id.*, at 517, 113 S.Ct. 2742 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence of law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed2d 225 (1992); see also *Wilson v. United States*, 162 U.S. 613, 620-521, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore, Evidence §278(2), p. 133 (J. Chadbourn rev. ed 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most **2109

> likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (* [W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. Reeves v. Sanderson Plumbing Products, Inc., supra at 147-148, 2108-2109.

Petitioner recognizes that showing that Respondent's proffered explanation is false, does not compel a finding of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 at 511, 113 S.Ct. 2742 at 2749, 125 L.Ed.2d 407 (1993). However, as explained by this Court in Hicks, a jury's ". . . disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case suffice to show intentional discrimination." Of course, if summary judgment is granted as in this case, the jury is deprived of the opportunity to suspect mendacity which can result from observing the demeanor and hearing the tone of the employer's witnesses. Hence, summary judgment should not have been granted in this case and a jury should hear and see Respondent's witnesses.

In Reeves, this Court noted that in some situations discrimination cannot be inferred by a jury even though an employer's explanation is shown to be false. However, the following from the Court's opinion shows that such situations will be exceptions and that generally discrimination may be inferred when the employer's explanation is false. The Court stated as follows on this point:

> . . . Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination has occurred." Reeves v. Sanderson Plumbing Products, Inc., supra at 148, 2109.

None of the possible exceptions to the general rule mentioned in Reeves that permit an inference of discrimination from evidence showing that an employer's explanation is false, together with the evidence making out a prima facie case, are present in Petitioner's case. The record in this case contains no uncontroverted independent evidence that no age discrimination occurred.

In her concurring opinion in Reeves, Justice Ginsburg addressed the question when a discrimination plaintiff would

be required to offer more than the following two categories of evidence in order to avoid judgment as a matter of law: evidence establishing a prima facie case; and, evidence from which a rational factfinder could conclude that the explanation proffered by the employer is false. Explaining that more evidence will be needed only in "uncommon" situations, Justice Ginsburg wrote as follows:

> As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante*, at 2108. Under this common sense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions give rise to a rational inference that the defendant could be making its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). but the inference remains-unless it is conclusively *155 demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see *ante*, at 2110-2111, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the

two categories of evidence described above. Reeves v. Sanderson Plumbing Products, Inc., supra at 154-155, 2112.

The clear holding of Reeves, made even more explicit in the concurring opinion, is that, absent limited exceptions not applicable here, an age discrimination plaintiff should survive summary judgement when the plaintiff puts forth evidence establishing a prima facie case and the falsity of the defendant's proffered explanation. This Court should review the Eighth Circuit's decision in this case because it holds, contrary to Reeves, that more evidence is required to get to a jury. In addition to the circumstantial evidence required under Reeves, the Eighth Circuit demands some undefined further proof of the defendant's motive. Under the Eighth Circuit reasoning, it appears some kind of admission or statement directly revealing the employer's state of mind is needed. Such evidence is rarely available and is not required under Reeves.

Petitioner also submits that this Court should review the decision of the Eighth Circuit in this case because it also conflicts with the ruling of at least one other circuit court. In Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2001), the circuit court reversed the grant of summary judgment to the employer. The court held that consistent with Reeves, that a prima facie case plus evidence of pretext is usually sufficient for a case to go to the jury and for the jury to find discrimination. Blow, supra at 298.

In Rowe v. Marley Co., 233 F.3d 825, 830 (4th Cir. 2000), the court noted that a discrimination claim must go to the jury where a plaintiff makes out a prima facie case and presents proof of pretext unless there is evidence that precluded a finding of discrimination.

The Eighth Circuit's ruling in this case conflicts with that of the Fifth Circuit and probably also the Fourth Circuit. In order to resolve the conflicting decisions on the important issue presented by this case, this Court should grant Petitioner's request for a writ of certiorari.

CONCLUSION

Petitioner requests that his petition for a writ of certiorari be granted because the issue in this case is important in discrimination cases and the decision of the Eighth Circuit conflicts with the decisions of this Court.

Respectfully submitted,

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June 12, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1099

[Filed March 14, 2003]

Gary Mayer,	)
Appellant,	)
	)
vs.	)
	)
Nextel West corporation,	)
a Delaware Corporation,	)
Appellee.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 14, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1099

[Filed February 6, 2003]

Gary Mayer,	)
Appellant,	)
	)
v.	)
	)
Nextel West Corporation,	)
a Delaware corporation,	)
Appellee.	)
	)

Appeal from the United States District Court
for the District of Minnesota

JUDGES:
Before RILEY, RICHARD S. ARNOLD, and SMITH, Circuit Judges.

OPINION

RILEY, Circuit Judge.

Gary Mayer (Mayer) sued Nextel West Corporation (Nextel) for violating the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), after Nextel terminated his employment. The district court[1] granted summary judgment to Nextel. Mayer appeals. Because the evidence does not create a reasonable inference that age was a determinative factor in Mayer's termination, we affirm.

I. BACKGROUND

In January 1997, Robert Wahner (Wahner), Nextel's 58 year-old general manager, hired Mayer, who was 57. Two months later, Nextel promoted Mayer to major account sales manager. On March 18, 1997, Wahner gave Mayer his first performance evaluation, which included twelve assessment areas.[2] An employee's rating for Level of Achievement in each area could be Development Required, Competent or Role Model. Wahner rated Mayer Competent in all areas.

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[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

[2] The evaluation rated Mayer in the following twelve areas: Work Habits; Customer Focus; Communication Skills; Teamwork; Job Knowledge/Know-How; Work Results; Diversity; Selection; Associate Development; Appraisal/Feedback; Work Environment; and Decision Making.

In July 1997, Phil Callahan (Callahan), age 34, replaced Wahner as general manager. On January 15, 1998, Callahan gave Mayer his second performance evaluation. Of the twelve areas, Callahan rated Mayer Competent in ten, but gave him a Development Required rating in Work Results and Selection. Under Work Results, Callahan wrote Mayer's "overall work results i.e. meeting quota and driving performance needs to improve. Needs to take more of a hands on approach and demand excellence." Under Selection, Callahan said, "Although [Mayer] has made timely hires, I would like to see Gary focus on the 'Right' person, not the task at hand - to fill headcount slots." Callahan, in his deposition, testified his criteria for the "right" person "would be probably two to six years sales experience, somebody that can manage high activity, that has been in a high activity business, someone that is intelligent, articulate, has sales experience, can overcome objections." Although Callahan rated Mayer Competent for Job Knowledge/Know-How, Callahan wrote he "would like to see Gary improve his product knowledge." Under Decision Making, Callahan wrote "Gary makes timely decisions, however, I would like to see Gary collect additional data before making those decisions."

On January 27, 1999, Callahan gave Mayer his third annual performance evaluation. The evaluation now contained thirty-six review areas, instead of twelve, and, contained five, not three, Performance Levels: (1) Below Requirements; (2) Requires Improvement; (3) Meets Requirements; (4) Very Good; and (5) Exceeds Requirements. Mayer received an overall Meets Requirements rating. Specifically, Mayer received a Meets Requirements rating in thirty review areas, a Very Good rating in three areas, and a Requires Improvement in three areas. The three Requires Improvement

areas were Initiative (Work Habits section), Listening (Communication Skills section) and Selection (Leadership section). Under Training and Development, Callahan instructed Mayer to improve his product knowledge. Under Activity Management, Callahan instructed Mayer to "Hold team accountable for their time and activities." Callahan also instructed Mayer to "Spend more time in the management role vs coaching role."

In August 1999, Callahan gave Mayer a mid-year evaluation, informing Mayer that "Quota is considered minimum performance." The evaluation also included a corrective action plan addressing two of the three areas in which Mayer received a Requires Improvement rating on his January 1999 performance evaluation.[3] Callahan told Mayer he had improved in the Work Habits/Initiative area, but had shown no improvement in the Listening area. Callahan wrote that Mayer "needed to continue to focus on activity management, performance improvement skills and holding [account executives] accountable to their forecast." Finally, Callahan told Mayer to "consistently exceed your quotas while learning the parts of the business, spend 3 1/2 days in service and repair."

On September 30, 1999, Callahan fired Mayer, who was then 60 years old. Mayer claims he was never warned he was facing dismissal, and, after Callahan told him he was terminated, had "repeatedly asked Mr. Callahan to give me

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[3] Even though the mid-year evaluation had a page entitled "Corrective Action Plan," Mayer claims there "is no such instrument that is called a Corrective Action Plan."

a reason for my termination but he refused to provide any." On October 11, 1999, Nextel wrote Mayer a letter informing him he had been terminated for "1) Poor Business Judgment, 2) Poor Business Knowledge and 3) Poor Sales Management Skills." Mayer claims Nextel had "a disciplinary instrument called a Personal Improvement Plan [PIP][4] for its employees whose performance is not acceptable." Mayer alleges two sales managers, ages 39 and 35, who also reported to Callahan, were placed on PIPs while he was not.

Mayer sued Nextel for age discrimination. Nextel moved for summary judgment, which the district court granted, holding the evidence does not create a reasonable inference that age was a determinative factor in Nextel's termination decision. Mayer appeals.

II. DISCUSSION

The district court's grant of summary judgment to Nextel must be reviewed de novo. *Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir. 1999). Summary judgment for Nextel is proper if the evidence, viewed in the light most favorable to Mayer and giving Mayer the benefit of all reasonable inferences, shows there are no genuine issues of material fact and Nextel is entitled to judgment as a matter of law. *See id.*; Fed. R. Civ. P. 56(c). We remain mindful "that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based." *Keathley*, 187 F.3d at 919.

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[4] Mayer references a Personal Improvement Plan, while Nextel refers to it as a Performance Improvement Plan. Consistent with both references, we will refer to it simply as a PIP.

The ADEA prohibits an employer from terminating an employee because of the employee's age. 29 U.S.C. § 623(a)(1). Because Mayer presented no direct evidence of intentional age discrimination, but rather based his claim solely on circumstantial evidence, we apply the well-known McDonnell Douglas analytical framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Calder v. TCI Cablevision of Mo.*, Inc., 298 F.3d 723, 728-29 (8th Cir. 2002). Under this three-part burden shifting framework, Mayer must establish a prima facie case of age discrimination by showing he (1) was at least 40 years old, (2) was terminated, (3) was meeting Nextel's reasonable expectations at the time of his termination, and (4) was replaced by someone substantially younger. *See McDonnell Douglas*, 411 U.S. at 802; *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 988 (8th Cir. 1996). If Mayer succeeds, a rebuttable presumption of unlawful discrimination is created. *Kneibert v. Thomson Newspapers, Mich., Inc.*, 129 F.3d 444, 451-52 (8th Cir. 1997).

The district court determined Mayer had established a prima facie case of age discrimination. The only contested element below was whether Mayer was meeting Nextel's reasonable expectations at the time he was terminated. Nextel has abandoned this argument on appeal, and rightfully so. See *Keathley*, 187 F.3d at 920 ("The standard to be applied in assessing performance is not that of the ideal employee, but rather what the employer could legitimately expect."). Thus, we agree Mayer has established a prima facie case of age discrimination.

Nextel must then produce evidence of a legitimate, nondiscriminatory reason for terminating Mayer. *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) ("This burden is one of production, not persuasion; it 'can involve no credibility assessment.'") (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)); *Kneibert*, 129 F.3d at 452. If Nextel meets its burden of production, the presumption disappears, and Mayer must show Nextel's reason for termination is a pretext for intentional age discrimination. *Kneibert*, 129 F.3d at 452. The district court determined Nextel met its production burden. We agree Nextel produced numerous legitimate, nondiscriminatory reasons for terminating Mayer. In addition to the three reasons cited in its October 1999 letter (poor business judgment, poor business knowledge, poor sales management skills), Nextel offered other reasons for the termination, including Mayer's sales team did not meet its potential, Mayer did not take forecasting seriously, and Mayer had two problems with major customers in September 1999.

Because Nextel met its production burden, the presumption of discrimination disappears and Mayer "can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual *and* (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision." *Rothmeier v. Inv. Advisers*, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996) (emphasis added). The "sole remaining issue [is] discrimination *vel non*." *Reeves*, 530 U.S. at 143 (internal quotation omitted). Even though the burden of production shifted to Nextel at the second stage of the McDonnell Douglas framework, the ultimate burden of persuading the factfinder of intentional age discrimination rests with Mayer at all times. *Id.*; *Rothmeier*,

85 F.3d at 1332 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

Mayer argues summary judgment is inappropriate because he established a prima facie case and presented evidence that Nextel's proffered reasons for termination are pretextual. Although the district court recognized "Nextel's proffered reasons for terminating Mayer may be pretextual," the court nevertheless found "no reasonable factfinder could conclude that Mayer's termination was based on age discrimination."[5]

The Supreme Court has made clear a "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false," will not "*always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148. "It is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Hicks*, 509 U.S. at 519. "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves,* 530 U.S. at 153.

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[5] As evidence of pretext, Mayer points out his sales team exceeded quota and he received favorable evaluations, proving he satisfied Nextel's expectations. He also contends age has not been excluded as a factor in Nextel's termination decision. Without so holding, we will assume Mayer has presented sufficient evidence to create a fact issue as to whether Nextel's reasons were pretextual.

Here, Mayer has established a prima facie case and, perhaps, even set forth sufficient evidence to reject Nextel's explanations for the termination.[6] Nevertheless, no rational factfinder could conclude Mayer's termination was discriminatory because no evidence creates a reasonable inference that age was the determinative factor for Mayer's termination.

In *Rothmeier*, we confronted the *Hicks* issue of "whether, in a case where the employee has established a prima facie case and has presented sufficient evidence for a jury to disbelieve the reasons proffered by the employer, the trial court nevertheless may decide as a matter of law that the evidence is insufficient for a reasonable jury to infer age discrimination and therefore may grant summary judgment to the employer." *Rothmeier*, 85 F.3d at 1335. Investment Advisors, Inc. (IAI) hired Rothmeier when he was 43 years old and fired him three years later after he had reported a Securities and Exchange Commission (SEC) violation to IAI's chief executive officer (CEO). IAI said it terminated Rothmeier for his division's poor performance, his unit's failure to achieve goals, and his insubordination or differences in management styles between him and the CEO. Rothmeier showed he had never received an unfavorable performance

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[6] We do not believe Mayer's pretext evidence is particularly compelling, but do not need to reach directly the issue of whether an issue of material fact exists as to pretext. Suffice it to say, Mayer's evidence does not even remotely resemble the type of evidence the Supreme Court discussed in Hicks and Reeves when declaring a plaintiff may, in some cases, survive a summary judgment motion by establishing a prima facie case and presenting sufficient evidence of pretext.

review, had never been warned about insubordination or his management style, and had received a $ 50,000 bonus just two weeks before he was terminated. Rothmeier sued for age discrimination, and the district court granted summary judgment to IAI.

Although the district court determined Rothmeier had created factual disputes as to pretext, the court still granted summary judgment "because the record was bereft of any suggestion that there was any age based animus involved in the decision of IAI and [the CEO] to terminate Rothmeier." *Id.* at 1331. On appeal, we read *Hicks* as allowing "a trial judge to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trierof fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext." *Id.* at 1335. We focused "on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiff's age." *Id.* at 1337.

We decided the problems between Rothmeier and the CEO were based on a bad business relationship and not age. We highlighted the fact that Rothmeier was hired and fired by the same individual within three years. We also recognized the reason for Rothmeier's termination clearly appeared to be the SEC investigation and not age. *Id.* Finally, we believed Rothmeier attempted to create an age discrimination case "by weaving an intricate web." *Id.* Rothmeier argued IAI replaced him with a younger employee because Rothmeier was too ethical, while a younger employee would not stand up to any SEC cover-up. We rejected this argument because we had "no inclination to accept the assertion that the content of one's

character is a proxy for age." *Id.* at 1338. After a careful review of the record, we concluded "Rothmeier presented neither direct evidence of age discrimination nor sufficient circumstantial evidence for a reasonable factfinder to infer that Rothmeier's age '*actually motivated*' his employer's decision to discharge him." *Id.* at 1337 (citations omitted).

As in *Rothmeier*, we believe Mayer has also tried to create an age discrimination case "by weaving an intricate web." To find an inference of intentional age discrimination, Mayer asks us to focus on Callahan's order to hire the "right" people and subsequent explanation that the "right" people were those with two to six years experience. Mayer characterizes these comments as age references. We reject this creative argument. To decide otherwise would indict countless employers seeking to hire employees with two to six years experience as discriminating based on age. If Mayer had provided additional evidence of possible age-based animus, then a court could allow the jury to determine whether the "right" people comment was also based on age animus.

Mayer's argument also distorts the evidence. Callahan wrote the order to hire the "right" people in Mayer's performance evaluation nearly two years before Nextel terminated Mayer. Callahan never explained to Mayer, and Mayer never asked Callahan, if the order meant Mayer should hire only young people. Callahan's order to hire the "right" people should, in no way, create a reasonable inference of age discrimination. The "two to six years experience" comment Mayer references is taken from Callahan's deposition, but Mayer's quotation is incomplete. Callahan testified his criteria for the "right" person "would be probably two to six years sales experience, somebody that can manage high activity,

that has been in a high activity business, someone that is intelligent, articulate, has sales experience, can overcome objections." This statement alone cannot create a reasonable inference Callahan meant for Mayer to hire only young people.

Mayer also asserts Callahan exhibited a pattern of discriminatory conduct toward individuals over age forty. First, Mayer claims Callahan only hires young people. After reading Mayer's briefs and reviewing the record, we are unable to find sufficient evidence to support this claim. Evidence, not contentions, avoids summary judgment. Second, Mayer claims Nextel placed two young sales managers on PIPs, but chose to terminate Mayer without placing him on a PIP. Nextel's uncontroverted explanation was only managers who failed to meet quota were placed on PIPs. Because Mayer had met quota, he was not eligible for a PIP. Nextel can certainly choose how to run its business, including not offering all at-will employees a PIP before termination, as long as it does not unlawfully discriminate in doing so. We refuse to sit as a super-personnel department who second-guesses Nextel's business decisions. *See Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 837 (8th Cir. 2002).

Finally, Mayer argues he was not provided any notice he might be terminated before Nextel actually terminated him, pointing out his favorable performance ratings and that his team exceeded quota. A review of his performance evaluations, including his 1999 mid-year evaluation and corrective action plan, could be construed as notice that his performance was not exemplary. Meeting quota was considered minimal, not optimal, performance. During his

tenure, Mayer's judgment, knowledge and management skills were consistently discussed in his evaluations. Notwithstanding, this case does not require us to resolve whether Mayer was entitled to actual notice before he was terminated. We are required to determine whether the evidence, including his lack of notice allegation, creates a reasonable inference that age was a determinative factor in Mayer's termination. We believe it does not.

Mayer cites numerous cases to support his contention that he presented sufficient evidence to infer Nextel terminated him based on his age. Those cases contain distinguishing facts, such as evidence of age-based animus that allowed inferences of intentional age discrimination, which are not present in this case. *See, e.g., Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922 (8th Cir. 2000) ("We need not decide if Fisher's prima facie case and the potential falsity of Pharmacia's proffered explanation would alone support an inference of discrimination in this case, because Fisher has presented additional evidence supporting an inference of discrimination . . . consisting primarily of disparaging age-related remarks . . . ."); *Madel v. FCI Mktg., Inc.*, 116 F.3d 1247, 1252 (8th Cir. 1997) ("We are primarily concerned with the allegedly pervasive use of age-based epithets by [the hiring official]."); *Ryther v. KARE 11*, 108 F.3d 832, 844 (8th Cir. 1997) ("The plaintiff produced overwhelming evidence as to the elements of a prima facie case, and strong evidence of pretext, which, when considered with indications of age-based animus in [plaintiff's] work environment, clearly provide sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination.").

Mayer continually argues "nothing in the records excludes age discrimination as the real reason for Nextel's actions." This argument misses the mark. Before a court can allow a discrimination case involving only circumstantial evidence to go to a jury, it must find sufficient evidence that would allow a reasonable factfinder to infer that age was a determinative factor in the adverse employment action. Mayer must show something in the record that suggests age discrimination was a reason for Nextel's actions. Because he has failed to produce such evidence, summary judgment was proper.

III. CONCLUSION

Because Mayer failed to produce evidence allowing a reasonable inference that age was a determinative factor in Nextel's termination decision, we affirm the district court's entry of summary judgment in Nextel's favor.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil No. 00-1469(DSD/JMM)

[Filed December 10, 2001]

Gary Mayer,	)
Plaintiff,	)
	)
v.	)
	)
Nextel West Corporation,	)
a Delaware corporation,	)
Defendant.	)
	)

JUDGES:
David S. Doty, Judge, United States District Court.

ORDER

This matter is before the court on defendant's motion for summary judgment [Docket No. 14]. Based on a review of the file, record and proceedings herein, and for the reasons stated, the court grants defendant's motion.

BACKGROUND

Plaintiff Gary Mayer ("Mayer") was employed by defendant Nextel West Corporation ("Nextel") from January 9, 1997 until September 30, 1999 as a sales manager. Mayer was 57 years old when Robert Wahner, then 58 years old, hired him to work at Nextel. After two months on the job, Mayer was promoted to the position of major account sales manager. In this position, Mayer supervised Nextel's sales personnel who worked with the company's largest accounts.

On March 18, 1997, Mayer received his first performance review as a Nextel employee. Robert Wahner, the company's general manager and Mayer's supervisor, completed the evaluation and gave Mayer a "competent" rating.

In July 1997, Phil Callahan, then 35 years old, ("Callahan") replaced Robert Wahner as general manager and Mayer's supervisor. On January 15, 1998, Callahan gave Mayer a performance review. The review stated that Mayer "performed satisfactorily" overall. Out of 12 categories, Mayer received a "competent" in ten categories and "development required" in two categories. These two categories were "Work Results," which directed Mayer to improve meeting the company's quota requirements, and "Selection," which directed Mayer to focus on hiring the "Right" people to fill empty positions. The performance review does not define who constitutes the "Right" person. In his affidavit, Callahan states that the "Right" person would be "one with two to six years of sales experience." (Callahan Dep., p.54.) In the category of "Job Knowledge/Know-How," Mayer received a "competent" rating. However,

Callahan added a written comment stating that he would like to see Mayer "improve his product knowledge."

On January 27, 1999, Callahan gave Mayer another performance review. Mayer's overall rating was "meets requirements." In 31 of 36 review categories, Mayer received a "meets requirements." In three areas, Mayer received a "very good" rating, and in three categories Mayer received a "requires improvement." The categories requiring improvement were "Initiative," "Listening" skills, and "Selection" of new employees. Under the "Selection" category, Callahan commented that he would "like to see Gary spend more time interviewing candidates."

In August 1999, Callahan prepared a written mid-year evaluation of Mayer. In this evaluation, Callahan stated that Mayer improved his work habits but still needed to work on his listening skills. Callahan created a "Corrective Action Plan" for both of these areas, which is required for any skill in which a Nextel employee receives a "Requires Improvement" on a performance review.

On September 30, 1999, Callahan fired Mayer. Nextel asserts that it fired Mayer due to his poor business judgment, poor business knowledge and his poor management skills. Mayer challenges his termination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621-634, the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363.01, and Minn. Stat. § 181.81. Defendant now moves for summary judgment and the court grants the motion.

DISCUSSION

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)(quoting Fed. R. Civ. P. 56(c)). A fact is material only when its resolution affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *See id. at 252.*

On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. *See id.* at 255. The nonmoving party, however, may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *See Celotex, 477 U.S. at 324.* Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. *Id. at 322-23.*

B. Age Discrimination

The ADEA makes it unlawful for an employer to discriminate against an employee on the basis of the employee's age. 29 U.S.C. § 623(a)(1). Because the parties agree that Mayer's claims are based on circumstantial evidence, rather than direct evidence, the court applies the burden shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (8th Cir. 1973).[1] Under this framework, Mayer must first establish a prima facie case of age discrimination. *Id.* at 802.

If Mayer establishes a prima facie case of age discrimination, the burden of production shifts to Nextel to articulate a legitimate, nondiscriminatory reason for any adverse employment action taken against Meyer. *McDonnell Douglas Corp*, 411 U.S. at 802. If Nextel puts forth such a reason, Mayer must then present evidence sufficient to raise a question of material fact as to whether Nextel's proffered reason was pretextual and to create a reasonable inference that

---

[1] ADEA and MHRA claims are analyzed under the same McDonnell Douglas burden-shifting framework. *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1208 n.6 (8th Cir. 1007) (reviewing MHRA claim under same standards as ADEA claim). Courts also apply the same ADEA and MHRA framework to clams brought pursuant to Minn. Stat. § 181.81. *DeRoche v. All Am. Bottling Corp.*, 38 F. Supp. 2d 1102, 1108 (D. Minn. 1998) (recognizing that Minn. Stat. §§ 181.81 and 363 are closely related in their statutory purpose but Section 181.81 provides "a more limited spectrum of relief"). Therefore, if Mayer cannot establish that he was discriminated against under the ADEA, he likewise has no claim for age discrimination under the MHRA or Minn. Stat. § 181.81.

age was a determinative factor in the adverse employment decision. *Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir. 1999). At all times, the burden of persuasion remains with Mayer. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

1. Prima Facie Case

To establish a prima facie case of age discrimination, Mayer must show that (1) he is a member of a protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) his employment was terminated; and (4) he was replaced by a younger person. *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000). Mayer has met his burden of establishing a prima facie case of age discrimination. Both parties concede that Mayer was terminated, that he was a member of a protected age group at the time of his termination, and that he was replaced by a younger person at Nextel. (Mem. Law Supp. Def.'s Mot. Summ. J. p.16., Mem. Law Opp'n Def.'s Mot. Summ. J. p.21.) The only prong of this test that is in dispute is whether Mayer was performing his job at a level that met Nextel's legitimate expectations. The evidence shows that Mayer was performing his job at a level that met Nextel's legitimate expectations.

Nextel asserts that Mayer was terminated for multiple reasons, including poor business judgment, poor business knowledge, and poor management skills. Nextel offers Mayer's performance evaluations as evidence of Mayer's poor performance as an employee at Nextel. Such evidence includes Mayer's January 15, 1998, performance review, in which Callahan states that he would like to see Mayer

improve his product knowledge and meeting the company's sales quota. Callahan also indicated that he would like to see Mayer gather more information before making decisions, spend more time monitoring his employees and hire the "Right" person for the job, not just fill headcount slots.

In addition, Nextel also offers Mayer's January 27, 1999, review as evidence of Mayer's poor performance at Nextel. On this review, Callahan states that he would like to see Mayer "initiate more," take more notes, spend more time interviewing candidates, improve product knowledge and delegate less work to other employees. Finally, Nextel contends that the 1999 mid-year evaluation is proof that Mayer was not successfully performing his duties as a sales manager. In that evaluation, a corrective action plan was created for Mayer to help him improve his listening skills, employee management skills and product knowledge. Nextel asserts that for these multiple reasons they were justified in terminating Mayer's employment with the company.

Although Mayer's performance evaluations do indicate that Mayer needed to improve some of his management skills, they also establish that Mayer met Nextel's legitimate employment expectations. In all of Mayer's performance reviews between 1997 and 1999, Mayer's performance as a Nextel employee was rated as "meets requirements" or the equivalent. Although Callahan indicated that Mayer needed to improve in three areas in his January 1999 review, Mayer also received a "very good" rating in three areas in that same review. Similarly, even though Callahan indicates in the 1998, 1999 and 1999 mid-year reviews that Mayer needs to make improvements, Mayer is still rated by Callahan as an employee who "meets" Nextel's requirements. Based on this

information, a reasonable jury could conclude that Mayer was performing satisfactorily at the time of his termination.[2]

In *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001), the plaintiff established a prima facie case of age discrimination under facts similar to Mayer. In *Sprenger*, the plaintiff received a series of reviews that indicated he needed to improve his skills in areas such as working with co-workers, developing marketing concepts for

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[2] The court notes that in *Miller v. Citizens Security Group, Inc.*, 116 F.3d 343 (8th Cir. 1997), the court held that performance evaluations that were more than one year old at the time the plaintiff was terminated could not be used as proof that the plaintiff was performing his job in a manner that met the employer's legitimate expectations at the time of termination. *Id.* at 346. However, this case is distinguishable from Miller in that Nextel has offered as evidence two performance evaluations that Mayer received in the same year he was terminated, one of which he received only one month prior to his termination. The court looks to the 1997 and 1998 performance evaluations only as proof that Mayer was consistently performing at a level that Nextel deemed to "meet" its expectations, and that performance level did not change in the year Mayer was terminated according to his 1999 performance reviews. In addition, Nextel offered Mayer's 1998 performance evaluation as proof that Mayer exhibited poor product knowledge. (Mem. Law Supp. Def.'s Mot. Summ. J. at p.11.) Because Nextel offered the 1998 evaluation as evidence that Mayer was not performing according to their legitimate expectations, despite the fact that it was more than one year old at the time of Mayer's termination, the court finds it reasonable to consider this evaluation in determining if Mayer was performing at a level that met Nextel's legitimate expectations.

his employer, and job knowledge. *Id.* at 1109-10. In 1997, the plaintiff's evaluation gave him an overall rating of "expected." *Id.* at 1109. In 1998 the plaintiff received an overall rating of "needs improvement." *Id.* at 1109-10. Two months later, the plaintiff received a revised performance review which rated his performance as "expected." *Id.* at 1110. Based on these facts, the parties stipulated that the plaintiff met his burden of showing that he was performing in accordance with his company's legitimate expectations. *Id.* at 1111.

In this case, Mayer received a "meets requirements" on all of his performance reviews. Although Mayer needed to improve his management skills, the standard to be applied in assessing performance is not that of the ideal employee, but rather what the employer could legitimately expect. *Keathley*, 187 F.3d at 920. As in *Sprenger*, the information contained in the reviews shows that Mayer's performance was adequate at the time of his termination. Therefore, Mayer has met his burden of showing that he performed his job at a level that met Nextel's legitimate expectations and he has established a prima facie case of age discrimination.

2. Legitimate, Nondiscriminatory Reason for Dismissal

Because Mayer has established his prima facie case of age discrimination, the burden of production now shifts and Nextel must come forward with a legitimate, nondiscriminatory reason for the dismissal. *McDonnell Douglas Corp.*, 411 U.S. at 802. In *Fisher*, the plaintiff met his burden of establishing a prima facie case of age discrimination and the burden shifted to the defendant to

articulate a legitimate, non-discriminatory reason for plaintiff's transfer. 225 F.3d at 920-21. The court found that the defendant met this burden by stating that plaintiff was transferred due to his lack of product knowledge, inability to communicate effectively with customers, unprofessional conduct during sales calls and a poor performance evaluation. *Id.* at 921.

As in *Fisher*, defendant in this case asserts multiple nondiscriminatory reasons for terminating Mayer's employment. Nextel states that Mayer was terminated because his sales team was not meeting its full potential, Mayer refused to take forecasting seriously and he had a lack of product knowledge and poor business judgment. Nextel offers multiple examples of Mayer's conduct as evidence to support these assertions. Further, Mayer concedes that Nextel met its burden of production under this prong of the test. (Mem. Law. Opp'n Def.'s Mot. Summ. J. p.22-23.) Based on this evidence, the court finds that Nextel has met its burden of producing legitimate, nondiscriminatory reasons for terminating Mayer's employment.

3. Pretext

Because Nextel has met its burden of providing a legitimate, non-discriminatory reason for terminating Mayer's employment, Mayer must now demonstrate that Nextel's proffered reasons are pretextual. *Keathley*, 187 F.3d at 919. The Supreme Court has stated that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*,

530 U.S. 133, 148 (2000). The Supreme Court, however, emphasized that:

> this is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set further sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. *Id.*

While the court finds that Mayer has presented sufficient evidence to cast doubt upon each of Nextel's asserted reasons for his termination, the court finds that Mayer does not provide sufficient evidence for a factfinder to conclude that Nextel's actions were motivated by discriminatory animus.

Turning first to the issue of pretext, the court concludes that Mayer has provided evidence that casts doubt on Nextel's proffered reasons for terminating him. As previously stated, Mayer established a prima facie case of age discrimination by showing that he was performing in accordance with Nextel's legitimate employment expectations. Mayer's reviews indicate that he was performing at a level that met Nextel's employee requirements. *See Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997) (stating that a history of favorable performance ratings support finding that employer's proffered reason for adverse employment action was false). Mayer also was never placed on a PIP to help him improve his management skills. Nextel created this plan to help employees overcome deficiencies in their work to avoid termination. Nextel has utilized this plan to help other employees meet employment standards. Because Mayer consistently received

the rating of "meets requirements" on his performance reviews, up to the month prior to his termination, the court finds that Mayer has raised an issue of material fact as to whether Nextel's proffered reasons for termination were pretextual.

Having found that Mayer has raised an issue of material fact regarding pretext, the court next considers whether he has presented sufficient evidence to raise a reasonable inference that age was a determinative factor in his termination. In *Reeves*, the Supreme Court clarified what types of evidence may give rise to an inference of intentional discrimination. As discussed, the Court stated that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification for an adverse employment action is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. 530 U.S. at 148. The Court, however, emphasized that proof that defendant's proffered reasons for terminating plaintiff are pretextual does not necessarily establish that plaintiff's proffered reason is correct. *Id.* at 146-147 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993)). The Court recognized that there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. *Reeves*, 530 U.S. at 148;

In *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), plaintiff sued his former employer alleging he was discharged because of his age. In considering defendant's motion for summary judgment, the Eighth Circuit stated that "[i]n the context of summary judgment, the question thus

becomes whether, in a case where the employee has established a prima facies case and has presented sufficient evidence for a jury to disbelieve the reasons proffered by the employer, the trial court nevertheless may decide as a matter of law that the evidence is insufficient for a reasonable jury to infer age discrimination and therefore may grant summary judgment to the employer." *Id.* at 1335. The court concluded that plaintiff's prima facie case of age discrimination and his evidence that defendant's proffered reasons for his discharge were pretext were insufficient, as a matter of law, to allow a reasonable fact finder to infer intentional discrimination based on age. *Id.* at 1337. The court reasoned that plaintiff presented neither direct evidence nor sufficient circumstantial evidence for a reasonable factfinder to infer that plaintiff's age motivated his defendant's decision to terminate him. *Id.* at 1337. As in *Rothmeier*, in this case Mayer has failed to prove that age was a determinative factor in Nextel's decision to terminate his employment. Mayer's prima facie case does not include any evidence which clearly establishes that he was terminated due to his age. Similarly, although Nextel's proffered reasons for terminating Mayer may be pretextual, no reasonable factfinder could conclude that Mayer's termination was based on age discrimination.

Mayer's primary proof that he was terminated due to his age is Callahan's written comment on his January 15, 1998, review which directed Mayer to focus on hiring the "right" people to fill empty positions. Callahan defined the "right" person as one with two to six years of sales experience. Mayer interprets this statement to include only younger individuals, as they will be most likely to have only two to six years of sales experience. However, this is a narrow interpretation of the statement. Any adult could potentially

have two to six years of sales experience. This standard could just as easily apply to a 55-year-old person as a 25-year-old person. The court believes that Callahan's statement was meant to convey Nextel's desire to hire people with some sales experience, rather than people with no experience at all.

Mayer also asserts the fact that he was not placed on a PIP as proof of age discrimination. Mayer states that Nextel previously placed younger employees on the PIP in an effort to help them meet the company's employee requirements rather than be terminated. Mayer contends that Nextel's failure to place him on a PIP demonstrates that he was terminated due to his age. While the court takes notice of the fact that Nextel did not offer Mayer an opportunity to improve his management skills through a PIP, this fact in itself does not prove age discrimination. There could be any number of reasons why Nextel did not place Mayer on a PIP. This fact, without more, simply does not prove age discrimination.

Finally, Mayer cites *Fisher v. Pharmacia & Upjohn* as a case in which the plaintiff established age discrimination based on facts similar to this case. This case is distinguishable from *Fisher*. In *Fisher*, the plaintiff was transferred due to his "inability" to meet the expectations Pharmacia and Upjohn had of its corporate sales unit employees. *Fisher*, 225 F.3d at 918. The plaintiff, however, presented evidence that he was performing at a level that met Pharmacia and Upjohn's legitimate expectations. *Id.* at 920. Pharmacia and Upjohn met their burden of showing a legitimate reason for the plaintiff's transfers and the court analyzed whether this reason was pretextual and whether the evidence created a reasonable inference that age was a determinative factor in the plaintiff's

transfer. *Id.* at 921-22. The court found that the plaintiff proved an inference of age discrimination through age-related remarks made to Fisher and other Pharmacia employees by members of Pharmacia's management. *Id.* at 922. These remarks included: "we need to get rid of the old guys," and Pharmacia "wanted to bring some of the younger people along faster." *Id.*

In this case, unlike *Fisher*, Mayer has failed to provide any evidence of age-based animus which could lead to an inference of age discrimination. None of the evidence that Mayer provided to prove a prima facie case of age discrimination would create a reasonable inference that age was a determinative factor in Nextel's adverse employment decision. Similarly, none of the evidence Mayer provided to prove pretext creates a reasonable inference that age was a determinative factor in the adverse employment decision. Therefore, Mayer has failed to prove that he was terminated based on his age.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that defendant's motion for summary judgment [Docket No. 14] is granted and plaintiff's claim is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 10, 2001

/s/_____
David S. Doty, Judge
United States District Court

Supreme Court, U.S.
FILED
AUG 19 2003
CLERK

No. 02-1817

IN THE

Supreme Court of the United States

GARY MAYER,

Petitioner,

v.

NEXTEL WEST CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Nextel West Corp. is a wholly-owned, indirect subsidiary of Nextel Communications, Inc. which is publicly traded.

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SUMMARY OF THE CASE

Petitioner Gary Mayer ("Mayer") commenced this action alleging that Nextel West Corp.'s ("Nextel") decision to terminate his employment was motivated by his age. The district court granted summary judgment for Nextel. The Eight Circuit affirmed "because the evidence does not create a reasonable inference that age was a determinative factor in Mayer's termination."

Mayer makes two arguments in his Petition for Writ of Certiorari. First, he argues that the Eighth Circuit's holding is contrary to this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Second, he argues that the Eighth Circuit's holding is inconsistent with the rulings of other circuit courts. Nextel respectfully submits that the Eighth Circuit's holding is well reasoned, properly applies *Reeves*, and is consistent with the rulings of the other circuit courts referred to by Mayer.

COUNTER STATEMENT OF THE CASE

Nextel refers the Court to the "Background" section of the Eighth Circuit's opinion for a recitation of the relevant facts. In addition, pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Nextel addresses what it perceives to be five (5) misstatements of fact in the Petition.

First, Mayer claims that he "received good performance reviews." This claim is not supported by the record. The record relied upon by the Eighth Circuit established that, on January 27, 1999, Callahan (Mayer's supervisor) prepared a written performance evaluation for Mayer. This evaluation rated Mayer's performance on a scale of 1-5 ("1" being the

lowest score). Although Callahan gave Mayer an overall rating of "3" (Satisfactory), there were three areas where Callahan rated Mayer "2" (requires improvement). In August of 1999, Callahan prepared a written Mid-Year Evaluation in which he reviewed Mayer's performance. This evaluation included a "Corrective Action Plan," which was required for any employee, such as Mayer, who received a "1" or "2" score on any item or area in his or her most recent performance evaluation. These performance evaluations do not meet Nextel's definition of "good."

Second, Mayer claims that his "supervisor fired him without warning."[1] As the Eighth Circuit noted: "A review of his [Mayer's] performance evaluations, including his 1999 mid-year evaluation and corrective action plan, could be construed as notice that his performance was not exemplary."[2] Moreover, there was evidence that Callahan criticized how Mayer handled two major accounts just prior to his termination. For example, in September 1999, Callahan sent an e-mail to Mayer strongly criticizing his handling of a major account.

Third, Mayer states that his supervisor made a remark about hiring the "right person," which he claims "might be interpreted by a jury as a preference for younger rather than older employees."[3] As the Eighth Circuit noted,

> Mayer's argument distorts the evidence. Callahan wrote the order to hire the "right" people in

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1. Petition at 2.

2. Petition, Appendix A at 13a.

3. Petition at 3.

> Mayer's performance evaluation two years before Nextel terminated Mayer. Callahan never explained to Mayer, and Mayer never asked Callahan, if the order meant Mayer should only hire young people. . . . The "two to six years experience" comment Mayer references is taken from Callahan's deposition, but Mayer's quotation is incomplete. Callahan testified his criteria for the "right" person "would probably be two to six years sales experience, somebody that can manage high activity, that has been in a high activity business, someone that is intelligent, articulate, has sales experience, can overcome objections."[4]

Fourth, Mayer claims, "Respondent changed its story" after it terminated his employment.[5] The record does not support this claim. The record establishes that, on September 30, 1999, Callahan terminated Mayer's employment for poor business judgment, poor product knowledge, and poor management skills. At his deposition, when asked to give specific examples to support the termination, Callahan explained that there were "multiple events that led up to Gary's termination." Callahan then described the specific events to which he was referring.

Fifth, Mayer claims, "all of the reasons assembled by Respondent for Petitioner's termination are contradicted by Respondent's own reviews of Plaintiff's performance."[6]

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4. Petition, Appendix A, at 13a.

5. Petition at 4.

6. Petition at 4.

The record does not support this claim. To the contrary, the record establishes that Mayer did not dispute any of the "multiple events" described by Callahan at his deposition. Moreover, the August 1999 Performance Evaluation and Corrective Action Plan was entirely consistent with, and supported the truthfulness of, Callahan's reasons for terminating Mayer's employment. For example, in these performance reviews:

- Callahan stated that Mayer has made no improvement in the area of listening, referencing the undisputed fact that Mayer missed a customer appreciation day and mis-communicated a promotion – two of the "multiple events" given by Callahan as reasons he terminated Mayer's employment.

- Callahan stated that Mayer needs to continue to work on holding all account executives accountable to their forecast – another of the "multiple events" given by Callahan as reasons he terminated Mayer's employment.

- Callahan stated that Mayer needs "to continue to focus on product knowledge" – another of the "multiple events" given by Callahan as reasons he terminated Mayer's employment.

In summary, the record was replete with undisputed evidence that performance issues were brought to Mayer's attention and he failed to adequately address them. Conspicuously absent from the record is any evidence that the decision to terminate Mayer's employment had anything to do with his age.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *REEVES*.

A plaintiff's *prima facie* case, "combined with sufficient evidence to find that the employer's asserted justification is false, ***may*** permit the trier of fact to conclude that the employer unlawfully discriminated." (Emphasis added). *Reeves*, 530 U.S. at 148. Use of the word "may" can have only one meaning in this statement.

> The Supreme Court has made clear a "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false," will not "*always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that the action was discriminatory."[7]

In other words, the ultimate question is still whether the employer intentionally discriminated, and the ultimate burden of proving intentional discrimination remains with the plaintiff. *Reeves*, 530 U.S. at 143; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Thus, contrary to Mayer's argument, this Court has clearly stated that a fact issue regarding an employer's asserted justification for its decision does not preclude summary judgment.

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7. Petition, Appendix A, at 9a.

Mayer argues that *Reeves* mandates that a case must go to the jury if there is a fact issue regarding the employer's asserted justification for its decision unless one of two limited exceptions are met: 1) the record conclusively reveals another non-discriminatory reason for the employer's decision; or 2) there is abundant and uncontroverted independent evidence that no discrimination occurred. However, the passage from *Reeves* that Mayer cites to for this proposition does not set forth limited exceptions. It sets forth illustrative examples. Indeed, the pertinent sentence begins with the phrase "[f]or instance." *Reeves*, *supra*, at 148.

Put another way, *Reeves* does not create a bright line rule. It explains that evidence calling into question an employer's justification for a decision should be considered for purposes of determining whether the plaintiff has created a reasonable inference that age was a determinative factor in the adverse employment decision. In fact, the primary reason this Court reversed the Fifth Circuit in *Reeves* was its finding that the Fifth Circuit erred in assuming that a plaintiff must introduce "additional independent evidence of discrimination," above and beyond evidence that the employer's proffered reason was false, in order to withstand a summary judgment motion. *Reeves*, *supra* at 120.

While evidence that an employer's justification is false may, under certain circumstances, be enough to avoid summary judgment, *Reeves* clearly explains that a weak issue of fact regarding an employer's justification for a decision may not be sufficient to avoid summary judgment in the absence of other evidence creating an inference that age was

a determinative factor in the decision. This is precisely what the Eighth Circuit reasoned in this case.

> We do not believe Mayer's pretext evidence is particularly compelling, but do not need to reach directly the issue of whether an issue of material fact exists as to pretext. Suffice it to say, Mayer's evidence does not even remotely resemble the type of evidence the Supreme Court discussed in *Hicks* and *Reeves* when declaring a plaintiff may, in some cases, survive a summary judgment motion by establishing a prima facie case and presenting sufficient evidence of pretext.[8]

Mayer essentially argues, if a plaintiff establishes a *prima facie* case and creates a fact issue with regard to the employer's justification for a decision, the employer is not entitled to summary judgment unless it proves that it did not discriminate through the submission of uncontroverted independent evidence. This argument constitutes a request that this Court lower the evidentiary standard a plaintiff must meet to avoid summary judgment and modify the *McDonnell Douglas* system to shift the burden of production back to defendants if there is a fact issue regarding the employer's proffered explanation for its decision. *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). There is no basis for Mayer to make such a request which flies in the face of a long line of Supreme Court authority stating that the ultimate burden of proving intentional discrimination remains with the plaintiff. *Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 511.

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8. Petition, Appendix A, at 10a, n.6.

In summary, this Court has clearly stated that a plaintiff may use evidence that an employer's justification for a decision is false to meet his burden of production under *McDonnell Douglas*. However, such evidence, in and of itself, will not always fulfill the plaintiff's burden on summary judgment. Consistent with these mandates, the Eighth Circuit reasoned that Mayer's "weak" evidence of pretext was not sufficient, on its own, to create a reasonable inference that age was a determinative factor in Mayer's termination.

II. THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE RULING OF ANY OTHER CIRCUIT COURT.

Mayer cites two cases for the proposition that the Fourth and Fifth Circuits differ from the rest of the circuits in their application of *Reeves*: *Blow v. City of San Antonio*, 236 F.3d 293 (5th Cir. 2001); and *Rowe v. Marley Company*, 233 F.3d 825 (4th Cir. 2000). These two cases do not conflict with the Eighth Circuit's decision in this case, and do not set forth the new evidentiary standard Mayer asks this Court to adopt.

In *Blow*, the Fifth Circuit noted that it was presented with "a straight forward application of *Reeves*." *Blow*, *supra*, at 298. Unlike the Eighth Circuit here, the Fifth Circuit in *Blow* determined that the plaintiff had made a strong showing of pretext through evidence of a scheme to actively conceal a promotional opportunity form the Plaintiff and prevent her from having an opportunity to pursue that promotion. *Id.* at 297. The Fifth Circuit held that this evidence, on its own, was sufficient to create a reasonable inference of discrimination in that case. In other words, it applied the same analysis as the Eighth Circuit here. The only difference

is that the Eighth Circuit held: "We do not believe Mayer's pretext evidence is particularly compelling" and thus it is insufficient to create a reasonable inference of discrimination.[9]

In *Rowe*, the Fourth Circuit affirmed summary judgment on behalf of an employer based upon a finding that there was insufficient evidence that the proffered reason from the employer was false. In its opinion, consistent with the Eighth Circuit's application of *Reeves*, the Fourth Circuit stated:

> Put another way, in *Reeves*, the Supreme Court held that when a plaintiff establishes a prima facie employment discrimination case and that his employer's explanation is pretextual, this does not automatically create a jury question, but it *may* do so. Even when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury . . . if "no rational fact finder could conclude that the action was discriminatory."

Rowe, supra, at 830. This is the exact determination that the Eighth Circuit made in this case.

In short, there is clearly no conflict between how the Eighth Circuit, Fifth Circuit and Fourth Circuit interpret *Reeves*. The decisions in this case, *Rowe*, and *Blow* only differ because the respective circuits considered different evidentiary records.

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9. Petition, Appendix A, at 10a, n.6.

CONCLUSION

For the reasons set forth above, Nextel respectfully requests that Mayer's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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